

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**



PRO SE HANDBOOK:

**The Manual for the Litigant Filing a
Lawsuit Without Counsel**

2005

PRO SE HANDBOOK

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TABLE OF CONTENTS

I.	Introduction.....	1
II.	Representation by an Attorney.....	2
A.	Obtaining An Attorney on a Contingency Basis or Pro Bono.....	2
B.	Appointment of Counsel by the Court.....	3
C.	Public Interest Organizations for Inmates to Contact in Order to Obtain Pro Bono Counsel.....	5
D.	Sanctions and How They Apply to the Pro Se Litigant.....	6
III.	The Seven Questions to Answer Before Filing a Lawsuit.....	7
1.	Have I suffered a real injury or wrong?.....	8
2.	Does the federal district court have jurisdiction to hear my claim?.....	8
3.	Is the Northern District the proper venue for my action?.....	9
4.	Will my claim be timely if I file it now?.....	10
5.	Am I able to determine and name the proper defendants for my action?.....	10
6.	Will I be able to establish sufficient facts to support my claims?.....	11
7.	Have I exhausted all other available remedies that I am required to exhaust?..	12
i.	Administrative Grievance Procedures.....	12
ii.	Employment Discrimination Claims.....	13
iii.	Petition for Writ of Habeas Corpus Under 28 U.S.C. §2254 or §2241....	13
iv.	Prisoner Challenges to Prison Conditions Under 42 U.S.C. §1983 and <i>Bivens</i>	14
IV.	Rules and Procedures for Filing a Case in the Northern District of New York.....	15
V.	Getting Started – The Complaint and How to File It.....	16
A.	The Complaint.....	17
1.	Caption.....	17
2.	Body.....	18

3.	Statement of Relief Sought.....	19
4.	Signing the Complaint.....	19
5.	Exhibits.....	20
6.	Privacy Protection.....	20
B.	Filing Fees and <i>In Forma Pauperis</i>	21
C.	Where to File.....	23
D.	Electronic Case Filing.....	23
E.	A Brief Look at the Most Common Documents in a Civil Action in Federal Court.....	23
VI.	Pretrial Proceedings and Case Management.....	27
VII.	Gathering Information.....	28
A.	Discovery: Gathering Information from Parties.....	28
1.	Interrogatories.....	29
2.	Depositions.....	29
3.	Document Production.....	30
B.	Gathering Information from Non-Parties.....	30
1.	Ask First.....	30
2.	Subpoenas.....	30
3.	Service and Expense of Subpoenas.....	31
4.	Opposition to Subpoenas.....	31
VIII.	Legal Research – An Overview.....	31
A.	Primary Authority.....	32
B.	Secondary Authority.....	34
C.	Basic Rules for Conducting Legal Research.....	34
IX.	Motions.....	34
A.	Documents Required to File a Motion.....	35
1.	Notice of Motion.....	35
2.	Affidavit or Affirmation.....	35
3.	Memorandum of Law.....	35
4.	Other Documents that May be Required.....	36

B.	Time Considerations.....	36
1.	Moving Papers.....	36
2.	Response Papers.....	37
3.	Reply Papers.....	37
4.	Cross-Motions.....	37
X.	Ending a Case Before Trial.....	37
A.	<i>Sua Sponte</i> Dismissal By the Court.....	37
B.	12(b)(6) Motion to Dismiss and 12(c) Motion for Judgment on the Pleadings.....	38
C.	Motion for Summary Judgment.....	38
D.	Alternative Dispute Resolution.....	39
E.	Settlement.....	40
F.	Failure to Prosecute and Default Judgment.....	40
XI.	Trial.....	41
A.	Final Pretrial Conference and Order.....	41
B.	The Trial – The Role of the Judge and Jury.....	41
C.	Selection of the Jury.....	42
D.	Opening Statements.....	42
E.	Testimony of Witnesses.....	43
F.	Motions During the Course of the Trial.....	43
1.	Motion in Limine.....	43
2.	Motion for Judgment as a Matter of Law.....	43
3.	Motion for Mistrial.....	44
4.	Objections.....	44
G.	Rebuttal Testimony.....	44
H.	Closing Arguments.....	44
I.	Charge to the Jury.....	44
J.	Mistrial.....	45
K.	Judgment and Costs.....	45
L.	Satisfaction of Judgment.....	45
M.	Post-Trial Motions; Appeals.....	45

CHAPTER I – INTRODUCTION

Welcome to the United States District Court for the Northern District of New York.

We have prepared this handbook specifically for the person who is representing him- or herself as a party to a lawsuit: the pro se litigant. This handbook is a practical and informative means of providing assistance to those individuals who are litigating claims pro se in a federal forum. **It is important that you read this entire manual before you ask the Clerk's Office specific questions about your potential lawsuit; many of your questions will undoubtedly be answered in the chapters of this handbook.**

While this handbook should be helpful for any person who is involved in litigation without the aid of an attorney, much of it is intended to inform the pro se *plaintiff*, i.e. the person who files the complaint. There are, however, also pro se *defendants*, i.e. people being sued, who will also find some important information in this handbook.

The early chapters of this handbook provide information that you should consider before filing your own lawsuit. If, after considering this information, you decide to file a case in federal court, additional information has been provided to assist you in filing your case and utilizing the appropriate rules of procedure for the United States District Court for the Northern District of New York. We have also provided you with an overview of the “ins and outs” of legal research.

This handbook should not be considered the last word, nor should it be your only resource. Rather, this handbook should be considered a procedural aid to help you should you choose to file and litigate a lawsuit.

If, after reading this manual, you still have questions about your case, you may contact the Clerk's Office. Our office is willing to assist you with certain questions you may have regarding the Local Rules of Practice as well as the Federal Rules of Civil Procedure. Please do not hesitate to contact us regarding a procedural matter. However, **employees of the**

Court cannot give legal advice.

For your convenience, the Clerk's Office for the Northern District of New York has offices in the following locations:

James T. Foley U.S. Courthouse
445 Broadway, Room 509
Albany, N.Y. 12207-2924
(518) 257-1800

U.S. Courthouse & Federal Building
15 Henry Street
Binghamton, N.Y. 13902-2723
(607) 773-2893

U.S. Courthouse & Federal Building
P.O. Box 7367, 100 S. Clinton St.
Syracuse, N.Y. 13261-7367
(315) 234-8500

Alexander Pirnie Federal Building
10 Broad Street
Utica, N.Y. 13501-1233
(315) 793-8151

Additionally, this manual, together with blank forms for the most common types of actions and a glossary of common legal terms, is available on the Internet at the following address:

<http://www.nynd.uscourts.gov>

CHAPTER II – REPRESENTATION BY AN ATTORNEY

This handbook was developed to address the needs of the litigant who is filing a lawsuit without the aid of an attorney. However, there may be alternatives to representing yourself if you are unable to afford to hire counsel.

A. OBTAINING AN ATTORNEY ON A CONTINGENCY BASIS OR PRO BONO

Some attorneys may be willing to accept your case on what is called a contingency basis, which means the attorney would receive a fee based upon a percentage of your recovery if you win your case, and the attorney would get nothing if you do not prevail. You should note that attorneys are careful when screening cases before agreeing to accept them on a

contingency basis, and may reject your case. However, if you would like assistance finding an attorney who may consider taking your case on a contingency basis, there are lawyer referral services that may be willing to help you. For a list of the Lawyer Referral Services located within the Northern District of New York, visit <http://www.nynd.uscourts.gov/prose.htm>.

In addition, there are attorneys and organizations, such as legal aid societies, that may be willing to represent you "pro bono," that is, free of charge. For a list of the Legal Aid Offices located within the Northern District of New York, visit <http://www.nynd.uscourts.gov/prose.htm>.

For **federal** inmates, a list of public interest firms that you should contact in an effort to secure representation on your own appears on page 5. For **state** inmates, there are several offices of Prisoners' Legal Services throughout the state. A list of the Prisoners' Legal Services is provided at the conclusion of this chapter on page 5.

B. APPOINTMENT OF COUNSEL BY THE COURT

If a pro se litigant's income and financial resources are low enough, the Court may determine that the person is "indigent." Typically the Court would recognize that a litigant is indigent by granting the litigant's *in forma pauperis* application. For more information regarding the *in forma pauperis* application and the effects of being permitted to proceed *in forma pauperis*, please refer to Chapter V, Section B on page 21 of his handbook.

A litigant who has been permitted to proceed *in forma pauperis* may request, by submitting a written motion, that the Court appoint counsel on his or her behalf **if he or she is otherwise unable to obtain counsel**. Before you submit such a motion, you must try to obtain counsel on your own. You should know that there are many more litigants seeking the appointment of counsel than there are attorneys willing to volunteer their services. Furthermore, while in a **criminal** case, a defendant is **entitled** to legal counsel by the United

States Constitution and one is provided if the criminal defendant is indigent, a party to a civil case is **not entitled** to an attorney, even if he or she is indigent.

The Court considers requests for counsel in light of a number of factors set forth by the Second Circuit Court of Appeals. First, the Court must determine whether the party's legal position in the lawsuit is of substance. If so, the Court will then consider several other factors, including how complex the legal issues are in the particular case, and the indigent party's ability to investigate and present his or her case. See *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335 (2d Cir. 1994), L.R. 83.3 (c).

If you are granted permission to proceed *in forma pauperis* and you decide to make a motion for the appointment of counsel, you must include with your motion details of your efforts to obtain counsel by means other than court appointment. In addition, you must include letters you received from the attorneys that you contacted regarding your case. **Failure to include documentation that substantiates your attempts to obtain counsel on your own will result in the denial of your motion for appointment of counsel.**

You should also know that an attorney may be appointed to serve in any number of different capacities. For example, an attorney may be appointed for the limited purpose of preparing a confidential report analyzing the merits of the claim(s) raised by the plaintiff. If a case proceeds to trial, an attorney may be appointed as trial counsel to conduct the trial of an action, as support counsel to assist another attorney, or merely as standby trial counsel to assist the pro se party in conducting the trial. In some cases, an attorney may be appointed as the pro se party's attorney for both pre-trial matters as well as the actual trial of the lawsuit. The capacity in which an attorney is appointed for a party is entirely within the discretion of the Court.

C. PUBLIC INTEREST ORGANIZATIONS FOR INMATES TO CONTACT IN ORDER TO OBTAIN PRO BONO COUNSEL

- (1) **Federal inmates** should contact the following public interest firms regarding possible pro bono representation:

(a) Community Law Offices
230 East 106th Street
New York, NY 10029
(212) 426-3000

(b) New York Civil Liberties Union
125 Broad Street, 17th Floor
New York, NY 10004
(212) 344-3005

- (2) **State inmates** should contact the following offices regarding possible pro bono representation:

**OFFICES OF PRISONERS' LEGAL SERVICES
FOR THE STATE OF NEW YORK**

(a) Statler Towers 1360
107 Delaware Avenue
Buffalo, NY 14202
(716) 854-1007

(b) 118 Prospect Street, Suite 307
Ithaca, NY 14850
(607) 273-2283

(c) 121 Bridge Street
Plattsburgh, NY 12901
(518) 561-3088

(d) 105 Chambers Street
New York, NY 10007
(212) 513-7373

D. SANCTIONS AND HOW THEY APPLY TO THE PRO SE LITIGANT

There is no doubt that representing yourself in a lawsuit carries certain risks and responsibilities. If you decide to proceed pro se, you will be responsible for learning about and following all the procedures that govern the court process.

The Court may penalize a party or attorney for failing to comply with a law, rule or order at any point while a lawsuit is pending. Such penalties are called sanctions, and pro se litigants are subject to the same sanctions as licensed attorneys. For example, when a party to a lawsuit presents a document to the Court, that party is verifying the accuracy and reasonableness of that document. Federal Rule of Civil Procedure 11 states that if such a submission is false, improper or frivolous, the party may be liable for monetary or other sanctions.

Rule 11 provides in pertinent part, as follows:

(b) Representations to Court. By presenting to the court ... a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, – (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may ... impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.... [T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or ... an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

As Rule 11 states, sanctions imposed by a Court could consist of, among other things, a monetary penalty or an award of the prevailing party's attorney fees, which could be a substantial sum. The Court may also prevent or “enjoin” a party from filing any future lawsuits until sanctions from an earlier lawsuit have been paid. Sanctions can be imposed on individuals who are incarcerated. See *Young v. Corbin*, No. 87-CV-433, slip op. at 8 (N.D.N.Y. June 23, 1995) (McAvoy, C.J.) (upholding sanctions against inmate who filed pro se lawsuit).

CHAPTER III – THE SEVEN QUESTIONS TO ANSWER BEFORE FILING A LAWSUIT

There are seven important questions you should consider *before* you file a case in federal court. This list is not exhaustive – there may well be other important considerations that are not listed here. However, these seven questions are essential to every lawsuit filed in federal court.

You should also be aware that even if you answer “yes” to all seven of these questions, and you believe you should prevail in your lawsuit, there is always a possibility that you may not ultimately prevail.

The Seven Questions to Consider Before Filing a Lawsuit:

1. Have I suffered a real injury or wrong?
2. Does the federal district court have jurisdiction to hear my claim?
3. Is the Northern District the proper venue for my action?
4. Will my claim be timely if I file it now?
5. Am I able to determine and name the proper defendants for my action?
6. Will I be able to establish sufficient facts to support my claims?
7. Have I exhausted all other available remedies that I am required to exhaust?

1. Have I suffered a real injury or wrong?

You cannot sue someone just because you are angry at him or her, nor can you sue someone simply because he or she has committed some illegal act. In order to maintain a lawsuit against someone, the person you are suing must have caused you to be harmed or wronged in some real, concrete way.

A plaintiff must be asserting his or her own personal legal interests. Typically a person may not sue to assert the rights of a third party. In other words, a litigant normally must assert that he himself has suffered the injury, or that a distinct group of which he is a part has suffered the injury. A court generally will not address a “generalized grievance,” which is an injury that is shared in “substantially equal measure by all or a large class of citizens.” See *U.S. v. Hayes*, 515 U.S. 737 (1995).

Finally, the plaintiff must have actually suffered the harm already, or else the plaintiff must be about to suffer the harm “imminently,” meaning the plaintiff will actually suffer the harm in the immediate future.

2. Does the federal district court have jurisdiction to hear my claim?

In general, a court must have the power to decide a particular case; this is called jurisdiction.

There are two court systems in the United States: the state court system and the federal court system. In New York State, the Supreme Courts are the courts of “general

jurisdiction,” which means they can hear and decide almost any kind of legal controversy between two parties.

Federal courts, on the other hand, only have jurisdiction over certain limited types of cases and controversies. A federal court has jurisdiction when the United States is a defendant in the action. Additionally, federal court jurisdiction may be based on either a federal question or diversity of citizenship. A federal question case is one that alleges that a federal law (either a statute or a provision of the United States Constitution) has been violated. Examples of claims that fall under the court’s federal question jurisdiction are civil rights claims under 42 U.S.C. § 1983 and employment discrimination claims under Title VII of the Civil Rights Act of 1964. A case’s federal jurisdiction is based on diversity of citizenship when the parties reside in different states, or a state and a foreign country. In order for a federal court to exercise jurisdiction over a case based on diversity of citizenship, the amount that the parties are disputing must be more than \$75,000.

If there is no federal statute governing your situation, and you and any of the defendants are citizens of the same state and/or the amount in controversy is less than \$75,000, a state court may be the proper place to bring your case.

3. Is the Northern District the proper venue for my action?

If you decide that your claim may be brought in a federal court because there is either a federal question, or there is diversity of citizenship and the amount in controversy is more than \$75,000, you must then determine in *which* federal court to file. In order to decide a case, a court must have some logical relationship either to the litigants or to the subject matter of the dispute; this is called venue.

There are four United States District Courts in New York State: Eastern, Southern, Western and Northern. Generally, you may only file an action in the Northern District of New

York if the actions or inactions that you believe violated your rights occurred within the boundaries of this District. Below is a list of the counties that are located within the Northern District to help you determine whether you should file your lawsuit in this District or another District Court.

COUNTIES WITHIN THE NORTHERN DISTRICT OF NEW YORK

Albany	Essex	Madison	Saratoga
Broome	Franklin	Montgomery	Schenectady
Cayuga	Fulton	Oneida	Schoharie
Chenango	Greene	Onondaga	Tioga
Clinton	Hamilton	Oswego	Tompkins
Columbia	Herkimer	Otsego	Ulster
Cortland	Jefferson	Rensselaer	Warren
Delaware	Lewis	St. Lawrence	Washington

4. Will my claim be timely if I file it now?

Usually a claim must be filed within a certain period of time after an injury occurs or is discovered. This time bar is called the statute of limitations, and the length of the statute of limitations varies depending on the type of claim. Some examples are as follows:

- | | | |
|-----|---|---------|
| (a) | Civil rights claims brought under 42 U.S.C. § 1983: | 3 years |
| (b) | Car accident or other personal injury: | 3 years |
| (c) | Contract dispute: | 6 years |

Whether your claim is barred by the statute of limitations is a legal question which may require you to do some legal research. You should make sure your claim is not time barred before you file a lawsuit.

5. Am I able to determine and name the proper defendants for my action?

When determining whom you should name as a defendant in your lawsuit, there are several factors you should consider.

First, you must allege that each person or entity you are suing engaged in wrongful conduct that caused you harm. Thus, you should only name a defendant if you are able to

describe his or her actions or inactions that you believe were wrongful and how you believe those actions harmed you.

Second, you must list individuals by their names whenever possible. Avoid suing groups of people such as “the personnel department” or “the medical staff.” Also, you should know that service of process cannot be effectuated on “John Doe” or “Jane Doe” defendants. If one of your defendants cannot be served, you will not be able to prevail in your lawsuit against that person. It is your responsibility, and not the duty of the Court, to ascertain the identities and addresses of those individuals whom you believe caused you to be injured.

Third, you should be aware that some people cannot be held liable for actions they take while performing the duties of their jobs. This is called immunity. For example, when a judge decides a case, he or she is immune from lawsuits for actions taken in the process of deciding that case. However, if a judge has operated a car illegally and caused you to be harmed, you can sue the judge for the damages you sustained because driving a car does not fall under the duties of being a judge. Similarly, prosecutors are immune from liability for actions they take in prosecuting or failing to prosecute individuals.

There may also be other legal defenses that a person can assert which will protect him or her from liability.

6. Will I be able to establish sufficient facts to support my claims?

In a lawsuit, the burden is on the plaintiff to prove that the defendants violated the plaintiff’s rights. Therefore, in order to win a case, a plaintiff must be able to present facts that support his or her claims. Asserting the mere conclusion that the defendant(s) caused you harm or violated your rights will be insufficient.

Before you begin a lawsuit, be sure you can allege sufficient facts to support your claim that the defendant(s) violated your rights. Such facts should include who each

defendant is, specifically what he or she did or did not do that you believe was wrongful, when the incident took place, and where the incident happened. You should also be able to identify how each defendant's actions or inactions caused you harm.

In order to prove your case, you must be able to provide evidence that supports the facts you allege. In addition, you need to be able to identify any witnesses whom you believe observed the incident. You may also be called upon to present actual articles of evidence such as a memorandum, police report, medical records or other proof.

7. Have I exhausted all other available remedies that I am required to exhaust?

You should be aware that, in some instances, it is necessary for you to pursue certain remedies **before** you can properly pursue a claim in federal court. There are four areas in particular where this is likely to arise: (i) if you are appealing a federal agency's decision, (ii) if you wish to sue a current or former employer for employment discrimination, (iii) if you are seeking a writ of habeas corpus in federal court (iv) if you are a prisoner and you seek to challenge prison conditions under 42 U.S.C. § 1983.

(i) Administrative Grievance Procedures: People frequently want to appeal the decision of a governmental agency that affects them. For example, a person may want to appeal the decision of the Social Security Administration to deny him or her social security benefits.

If you want to appeal the denial of a benefit that is provided through an agency of the United States government, you must pursue **all** of the administrative procedures established by the agency for appealing its rulings **before** you file a lawsuit. **Only after** you have exhausted your administrative remedies, and you still believe you are entitled to a benefit that you have not received, may you initiate a lawsuit.

(ii) Employment Discrimination Claims: A person who believes he or she has been illegally discriminated against by an employer may wish to bring a lawsuit against that employer under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act or the Equal Pay Act. However, before a person can bring such a lawsuit, he or she must first file a complaint with either the Equal Employment Opportunity Commission ("EEOC") or the New York State Division of Human Rights ("NYSDHR"), and obtain from the EEOC or NYSDHR what is called a "right-to-sue letter." Only if a person properly files a complaint with the EEOC or NYSDHR, and receives a right-to-sue letter from the agency, may he or she then file a complaint in federal court based on the allegations the person has made in their complaint to the EEOC or NYSDHR. A copy of the right-to-sue letter should be attached to the complaint the person files with the court.

(iii) Petition for Writ of Habeas Corpus under 28 U.S.C. §§ 2254 or 2241: A person who is incarcerated or is otherwise "in custody" pursuant to a judgment of conviction rendered in a state court order may wish to challenge the **fact** or **duration** of this confinement. Such a challenge would be brought as a petition for a writ of habeas corpus under 28 U.S.C. § 2254, and it would be brought against the person who holds the inmate in custody, i.e., the prison's superintendent. If the person can successfully prove that a constitutional right was violated, and that if that right had not been violated the person would not have been incarcerated at all (the "fact of incarceration") or the duration of the incarceration would have been shorter, the Court will grant a writ of habeas corpus.

However, before a petition under 28 U.S.C. § 2254 can properly be filed in the federal court, the petitioner must pursue and exhaust **all** available state law remedies. This means that if you want to challenge a conviction or a sentence, you must pursue your rights of

appeal under New York law, in New York State courts. You may also be required to file one or more collateral proceedings under New York Law, such as a motion to vacate the judgment of conviction pursuant to Section 440.10 of New York's Criminal Procedure Law, or seek a writ of error *coram nobis*, in order to exhaust your claims.

A petitioner must exhaust all administrative remedies before filing a habeas action pursuant to 28 U.S.C. § 2241.

You should also realize that there are time limits that apply to petitioners seeking a writ of habeas corpus. Habeas petitions brought under 28 U.S.C. § 2254 may be filed no later than one year after the completion of state court direct review, with certain limited exceptions. See 28 U.S.C. § 2244(d)(2). The time during which a properly filed state court application for collateral review is pending is excluded from the one-year period. See 28 U.S.C. § 2244(d)(2); *Reyes v. Keane*, 90 F.3d 676, 678 (2nd Cir. 1996). Therefore, if you are contemplating filing a habeas petition, you should be sure to file your action in a timely fashion.

(iv) Prisoner Challenges to Prison Conditions Under 42 U.S.C. §1983 and *Bivens*: The Prisoner Litigation Reform Act (PLRA) was passed by Congress in 1995. The PLRA requires that prisoners exhaust all available administrative remedies before they file a lawsuit under 42 U.S.C. § 1983 to challenge the conditions of their confinement or allege other civil rights violations. This means that, if you are a prisoner, you must utilize your facility's grievance procedures first in an attempt to resolve your problem. Generally, you may only file a lawsuit under section 1983 if you have already pursued your grievance through each stage of the facility's grievance process but still not obtained redress.

A section 1983 action is brought against state actors. If a prisoner wishes to bring an action for a violation of constitutional rights by a federal actor, he or she would instead file

what is called a "*Bivens*" action. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A *Bivens* action, though not precisely parallel, is much like a section 1983 action, and a prisoner must also exhaust administrative remedies before bringing a *Bivens* action.

In conclusion, it is important that you consider all of these questions before you file a case. After all of these factors have been considered, you must still follow the procedures set out by the particular court with which you decide to file your case. Many of the specific procedural rules for the Northern District of New York are set forth in the Local Rules, and in Chapter IV of this handbook we will discuss the rules and procedures for filing lawsuits in the United States District Court for the Northern District of New York. If your case needs to be filed in any other court, you should contact the Clerk's Office of that court for information regarding local rules and procedures for filing your case.

CHAPTER IV – RULES AND PROCEDURES FOR FILING A CASE IN THE NORTHERN DISTRICT OF NEW YORK

If you are a party to a lawsuit, you are subject to the specific rules of procedure for the Court in which your case is filed. Federal courts are governed by the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") as well as other rules of procedure regarding specific areas such as evidence, appeals, etc.

In the United States District Court for the Northern District of New York, all procedures are governed not only by the Federal Rules but also by the Local Rules of Practice and the District's General Orders. The numbering system of the Northern District's Local Rules coincides with the numbering system of the Federal Rules for easy reference.

Copies of the Federal and Local Rules of Civil Procedure can be found at County

Court House libraries, law schools, and correctional institutions throughout the state. Additionally, the Federal Rules of Procedure are available at <http://www.law.cornell.edu/rules/frcp/overview.htm>, and the Local Rules for the Northern District of New York are available at <http://www.nynd.uscourts.gov/localrul.htm>.

You can also obtain a personal copy of the Northern District's Local Rules, or of this handbook, if you come in person to any of the Clerk's Offices listed in Chapter I of this handbook. The Clerk's Office can mail you a free copy of this handbook upon request. The Clerk's Office can also mail you a copy of the Northern District's Local Rules if you send a check or money order for \$3.60 to the Clerk of the Court.

It is important to remember that, as a pro se litigant, **you are responsible for becoming familiar with and following the Court's Local Rules and procedures.** Therefore, before you begin drafting your complaint or take any other action, you should read the Federal and Local Rules and become familiar with them. Not only may you be subject to sanctions for failing to follow the Rules, but the Rules will also help answer many questions that you may have as you begin and proceed with a lawsuit.

CHAPTER V – GETTING STARTED: THE COMPLAINT AND HOW TO FILE IT

In order to begin a lawsuit in Federal Court, a plaintiff must submit to the Clerk of the Court the following documents:

1. A civil cover sheet
2. 2 copies of a complaint, plus one additional copy for each defendant named in the complaint
3. Either a filing fee or an application to proceed *in forma pauperis*. Note: An inmate who wishes to proceed *in forma pauperis* must have his or her application certified by the proper prison official and must also submit an inmate authorization form along with his or her application
4. A summons for each defendant

5. If you are seeking permission to proceed *in forma pauperis* and you wish the U.S. Marshals to serve your summons and complaint for you, you must also submit one completed USM-285 form for each defendant

Each of these will be discussed in more detail in this Chapter. This list is not exhaustive; you should be aware that certain types of actions may require the plaintiff to submit additional documents before the action may properly be filed.

All papers filed with the Court must meet the requirements that are set forth in Federal Rules 8 and 10, and Local Rule 10.1. Local Rule 10.1 requires, among other things, that the paper be 8 ½ x 11 inches, and of good quality. It also requires that **all documents be plainly and legibly written, typewritten, printed or reproduced**, in black ink. If the papers are typewritten, they must be in at least 12 point font, with any footnotes in at least 10 point font, and the text must be double-spaced. The pages must be consecutively numbered, and must be fastened together.

Please review the full text of Local Rule 10.1 and Federal Rules 8 and 10 before you start drafting your complaint. The Clerk's Office has prepared form complaints for the most common types of actions, such as civil rights claims under 42 U.S.C. § 1983, employment discrimination claims, and petitions for a writ of habeas corpus. The form complaints can be found on the Court's website and in most prison law libraries, and can also be obtained at the Clerk's Office. You may wish to use a form in preparing your complaint.

A. THE COMPLAINT

(1) Caption: Every document that you file with the Court, including the complaint, should have a caption at the top of the first page. The format for a caption is as follows:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

(YOUR FULL NAME)

Plaintiff,

v.

(LIST EACH AND EVERY PERSON YOU
WISH TO SUE, BY NAME)

Defendant(s).

Civil Action No. _____
(Judge's initials)

Complaint

When you first submit a complaint your lawsuit will not yet be assigned a civil action number, so you can leave that space blank in the caption. The Clerk will assign your case a number if your complaint is accepted for filing. Once your action is assigned a civil action number, that number must appear on each and every document pertaining to your lawsuit that you file with the Court. Likewise, if your complaint is accepted for filing, the Clerk will typically assign one district judge and one magistrate judge to your case. All documents must include the initials of both judges, once they have been assigned.

(2) Body: The main portion of your complaint is called the "body." Fed.R.Civ.P. 10 requires that **each paragraph in the body of the complaint be consecutively numbered.** Your first paragraph should state the basis for the Court's jurisdiction over your claim. See Chapter III, question 2 on page 8. Your second paragraph should state why the Northern District is the proper venue for your action. See Chapter III, question 3 on page 9.

Next you should include one paragraph for each party to the action; in each of those paragraphs you should state the name, title and address of each party. **If at any time your own address changes you must immediately notify the Court in writing. If your complaint has been accepted by the Court and served on the defendant(s), you must**

also immediately serve the defendant(s) with a written notice of your change of address.

Once you have completed the above paragraphs, you should state your claim against the defendant(s). Fed.R.Civ.P. 8 requires that a complaint be a “**short and plain** statement of the claim showing that the pleader is entitled to relief.” In other words, in short, clear, numbered paragraphs you should describe the actions or inactions of the defendant(s) that you believe violated your rights. You should also state which of your legal rights you believe the defendant(s) violated. Each paragraph should only state one act of misconduct. Furthermore, you should include sufficient **facts** to support your claims. See Chapter III, question 6 on page 11.

Thus, if you claim that your legal rights were violated by more than one defendant, or on more than one occasion, your complaint should include a corresponding number of paragraphs for each allegation. Each paragraph should specify (i) the alleged act of misconduct; (ii) the date on which the misconduct occurred; (iii) the names of each and every individual who participated in that misconduct; (iv) the location where the alleged misconduct occurred; and (v) the nexus between the misconduct and your legal rights.

Your complaint should be limited to a statement of facts; it should not contain legal citations or legal arguments. It is inappropriate to include legal citations or arguments in your complaint because "it is the court's function to analyze the law." See *Jochowitz v. Russell Sage College*, No. 90-CV-1101, 1992 U.S. Dist. LEXIS 6710 (N.D.N.Y. 1992) (Munson, J.).

(3) Statement of Relief Sought: After you have stated your claims as clearly and concisely as possible, you should briefly state what "relief" you are seeking. In other words, you must state what it is that you wish the Court to do. For example, a plaintiff could be

seeking monetary compensation ("damages"), or a court order that the defendant must stop or start doing something ("injunctive relief").

(4) Signing the Complaint: Fed.R.Civ.P. 11 requires that **every plaintiff must sign and date his or her complaint**. If possible, the complaint should be signed and dated in the presence of a notary public. A complaint that is not signed will be dismissed by the Court unless the plaintiff promptly corrects the omission by submitting a signed copy of the complaint.

Remember that by signing or filing your complaint you are certifying to the Court that the statements you have made in the complaint are true, and that you are not filing the complaint for an improper purpose such as to harass the defendant(s). See Chapter II, Section D on page 6 for a discussion of the sanctions that may apply if your complaint is false or submitted for an improper purpose.

(5) Exhibits: While you may choose to submit one or more exhibits along with your complaint, you must set forth your complete claims in the body of your complaint and may not incorporate the exhibits by reference as a means of setting forth your claims. You do **not** need to submit as exhibits all papers that might be relevant to your complaint and/or used at trial. If you do choose to submit exhibits you must reference those exhibits, by page number, in the body of your complaint. Also, you should only submit copies of documents rather than originals, because the Court will not return your exhibits to you.

(6) Privacy Protection: Local Rule 8.1 requires litigants to redact (omit or obscure) certain information from their pleadings and from any exhibits attached to pleadings. Information that must be redacted includes: social security numbers, names of minor children, dates of birth, financial account information and home addresses.

Transcripts of the administrative record in social security proceedings and state court

records relating to habeas corpus petitions do not need to have the above personal identifiers redacted.

B. FILING FEES AND *IN FORMA PAUPERIS*

Most civil complaints must be submitted with the filing fee set forth in 28 U.S.C. § 1914(a), which is currently two hundred and fifty dollars (\$250.00). (The fee was recently increased from \$150 by the Omnibus Appropriations Act of 2005, effective February 7, 2005). You must either pay the fee in full at the time you present your complaint to the Court for filing, or, if you are unable to pay the fee, you must submit an application to proceed *in forma pauperis* along with your complaint.

If you file an application to proceed *in forma pauperis* instead of a filing fee, the Court will then consider your application and determine whether you are entitled to proceed *in forma pauperis*. See Local Rule 5.4. If the Court denies your *in forma pauperis* application, you must pay the full statutory filing fee within a certain period of time or your action will be dismissed.

If you are an inmate, you will still be required to pay, over time, the entire \$250.00 filing fee even if you are found to be indigent. Inmates are required to submit an “inmate authorization form,” which permits the agency holding the plaintiff in custody to make periodic withdrawals from the plaintiff’s inmate account until the entire \$250.00 fee is paid. See Local Rule 5.4(b).

For non-inmates, being granted permission to proceed *in forma pauperis* typically relieves the litigant of the obligation to pay the \$250.00 filing fee.

In addition to delaying the payment of the filing fee for prisoners or waiving the obligation to pay the filing fee for non-prisoners, being granted permission to proceed *in*

forma pauperis entitles a person to the following: 1) submit a motion for appointment of counsel, and 2) have his or her complaint served on the defendant(s) by the U.S. Marshals. If you are not proceeding with your action *in forma pauperis*, you will be responsible for serving the summons and complaint on each defendant, in accordance with Fed.R.Civ.P. 4.

You may submit an *in forma pauperis* application at any time during the litigation, even if you have already paid the filing fee in full. However, you should note that being permitted to proceed *in forma pauperis* after you have paid the fee will not entitle you to the return of the money you have paid.

Pro se litigants proceeding *in forma pauperis* are not exempt from other fees and costs in their actions, including but not limited to copying and witness fees. Thus, pro se litigants must still provide identical copies of documents that must be served on the parties that they name in their lawsuit. If you cannot afford to pay for copies, you must handwrite copies of these documents for service on the other parties to the action.

It is important to realize that, even though you believe you cannot afford to pay for copies of documents, neither the Court nor the Clerk's Office can make copies for you free of charge. Therefore, even if you are proceeding with an action *in forma pauperis*, copies of documents in the file of your action cannot be provided to you by the Clerk's Office without a charge of \$0.50 per page, which must be paid in advance. **You should always keep a copy, for your own records, of all documents that you send to the Court or the Clerk's Office.**

C. WHERE TO FILE

You must either deliver your documents to the Clerk of the Court in person, or send the documents in the mail. Prisoners should send complaints and other documents to the Syracuse office of the Clerk of the Court, addressed to the attention of the Inmate Litigation Unit. Please refer to Chapter I, page 2 for the locations and mailing addresses for the Clerk's Offices in the Northern District of New York. The Northern District does not accept any filings via facsimile.

D. ELECTRONIC CASE FILING

On January 1, 2004, the Northern District of New York implemented a new electronic case filing system (called Case Management/Electronic Case Files, or CM/ECF) that allows attorneys to file and view court documents over the Internet. General Order 22 governs the administrative procedures for electronic case filing. However, pro se parties are still required to submit and serve paper originals of all their documents. The Clerk's Office then scans the pro se party's documents into the CM/ECF system so that those documents can be viewed on-line by the attorneys who represent the opposing party or parties.

E. A BRIEF LOOK AT THE MOST COMMON DOCUMENTS IN A CIVIL ACTION IN FEDERAL COURT

The following table may be used as a quick reference regarding the most common items that must be completed and filed by a party, a brief description of each item, the Federal or Local Rules that relate to each item (if any) and when the item must be submitted to the Clerk.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Civil Cover Sheet	The document that must accompany the complaint and summons before filing can occur.	LR 3.1	Initial filing.
Complaint	Commences the action when filed by the Clerk of the Court. Names the parties, and succinctly sets forth the controversy, including allegations of fact and the relief sought. Does not include legal argument.	FRCP 3, 8 & 10 LR 8.1, 10.1	Initial filing.
<i>In forma pauperis</i> application	<p>Application made under penalty of perjury which seeks waiver of filing fee.</p> <p>For non-inmates, if granted, filing fee only (not other fees such as witness or copying fees) is waived.</p> <p>For inmates, if granted, filing fee need not be paid in full at one time, however it must be paid in accordance with 28 U.S.C. § 1915. In order to have the application granted, inmates must submit an authorization form (see below).</p>		Initial filing.
Authorization Form (Inmates Only)	Authorizes agency having custody of the inmate to calculate, encumber and/or disburse funds from inmate account in order to pay filing fee.	LR 5.4(b)	Initial filing.
USM-285 Form	Directs the U.S. Marshals Service to serve the defendant listed on the form with Summons and Complaint. You must fill out one USM-285 form for each defendant.		Initial filing.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Summons	<p>Served on the defendant with a copy of the complaint.</p> <p>A “Waiver of Service of Summons” can also be served on the defendant along with a copy of the complaint.</p> <p>The summons informs the defendant that unless a response to the complaint is filed, a judgment may be entered in favor of the plaintiff.</p>	FRCP 4 LR 5.1(f) <i>et seq.</i>	Initial filing.
Answer	<p>Filed by the defendant(s), the answer is a short and plain statement of the defenses to the claims stated in the complaint. The defendant(s) must either admit or deny each specific allegation in the complaint.</p>	FRCP 12	Within 20 days from the date of service of the complaint. The United States and federal officials have 60 days to file the answer.
Pretrial Scheduling Orders (incarcerated plaintiffs only)	<p>Issued by the Court, a Pretrial Scheduling Order sets deadlines for pretrial motions.</p>		Issued by the Court after an answer is filed.
Rule 16 Case Management Orders (non-incarcerated plaintiffs only)	<p>Issued by the Court, following a Case Management Conference, which is held shortly after the action is commenced. A Rule 16 Case Management Order sets deadlines for pretrial motions. Parties must confer and file a proposed plan prior to the Case Management Conference.</p>	FRCP 16 LR 16.1	Issued by the Court after the Case Management Conference.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Motions	Items which seek an order from the Court on some particular matter during the pendency of a case. A party who files a motion is called a "movant."	Various Federal Rules, such as 12 and 56 <u>LR 7.1</u>	At least 31 days before the "return date" of the motion, which is the date on which the motion is to be heard by the Court. Must be filed before deadline for the filing of motions expires.
Response to motions	Response to motion filed by the other party or parties.	LR 7.1(b)	At least 17 days before the return date of the motion.
Copies of Documents	When motions, stipulations, letters or any other documents are sent to the Clerk or the Court, copies of any such documents must also be sent to all other parties to the action.	LR 5.1	When papers are sent to Court or the Clerk.
Discovery	All discovery requests, and the responses thereto, must be served upon other counsel and parties. Discovery shall NOT be filed with the Court except: I) if the Court orders particular materials to be filed; ii) when a party is making a motion pursuant to Fed.R.Civ.P. 37 regarding particular discovery materials; or iii) materials that are to be used at trial are to be filed with the Court prior to trial	FRCP 37 LR 26.2	Discovery must be completed within Court-imposed deadlines.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Proof of Service	Whenever a document is sent to the Court, there must be a "proof of service" document included, which states that a copy of that document was sent to the other party/parties or their attorneys.	LR 5.1	Attached to the document sent to the Court or the Clerk.

CHAPTER VI – PRETRIAL PROCEEDINGS AND CASE MANAGEMENT

Upon the filing of a pro se complaint, the Court will review the pleading to determine whether it complies with the pleading requirements of the Federal Rules of Civil Procedure and to assess the sufficiency of the plaintiff's claims. Following that review, the Court will issue an order advising the plaintiff of its determinations and directing further action.

In order to help litigants resolve their civil disputes in a just, timely and cost-effective manner, the Court will issue a case management or pretrial scheduling order. These orders are not issued in habeas corpus cases.

When the pro se plaintiff is incarcerated, the Court will issue a Pretrial Scheduling Order after an answer has been filed on behalf of the defendants. The Order sets deadlines for the filing of non-dispositive motions and includes important information regarding the other aspects of pretrial proceedings. The Pretrial Order also advises the parties of their right to consent to have all further proceedings conducted by a U.S. Magistrate Judge. See 28 U.S.C. § 636(c).

In cases where the pro se plaintiff is not incarcerated, a Case Management Conference will be scheduled by the Court shortly after the action is commenced. This conference is sometimes referred to as a Rule 16 Conference.

Prior to this conference, the parties will have to confer about and file a Case

Management Plan. The Case Management Plan used by the Northern District of New York is set forth in General Order 25, which you should read and become familiar with. The parties are required to jointly address the items contained in the Case Management Plan, and to file the completed Plan with the Clerk's Office not later than ten days prior to the conference date. In order to complete the Case Management Plan, you must identify and confer with the opposing party or parties about your anticipated discovery requests (see Chapter VII for more information about discovery). You and the opposing party or parties must also decide upon a proposed timetable for discovery and for trial.

Following the Rule 16 Conference, the Court will issue a Uniform Pretrial Scheduling Order.

CHAPTER VII – GATHERING INFORMATION

A. DISCOVERY: GATHERING INFORMATION FROM PARTIES

After pleadings are served, each party will typically gather information to support his or her case. (A “party” is a plaintiff or a defendant). This phase of the lawsuit is called “discovery,” and is conducted in accordance with Fed.R.Civ.P. 26 through 37. The information can be in the form of oral or written statements made by the parties themselves, or by witnesses, regarding a particular event or series of events. Parties often need to gather documents also, such as medical records, business records, transcripts from prior court proceedings, etc. Sometimes parties will need to collect or examine physical objects, as well.

It is important for you to remember that typically each party in an action will seek some discovery. This means that if you file an action, you will need to both seek information from the parties you are suing, as well as provide information to them. For example, by filing an action in which your medical condition or treatment is in issue, at least some of your own

medical records will be relevant to the case and will likely be sought in discovery. You will then need to provide written consent, authorizing release of the relevant medical records to opposing counsel. You may also need to provide such a consent form if you are seeking discovery of your own medical records.

It is also important for you to know that the costs of discovery remain the responsibility of each party, regardless of whether either party has been granted permission to proceed *in forma pauperis*. See L.R. 5.4.

(1) Interrogatories: One of the most cost-effective ways to get a sworn statement from someone who is a party to the action is to serve interrogatories on that party. Interrogatories are written questions that must be answered, under oath, by the party on whom they are served. Fed.R.Civ.P. 33 governs interrogatories.

You should note that you are limited to twenty-five interrogatories, counting each sub-part separately, for each party. A person may serve more interrogatories on a party **only** if the Court grants the party special permission to serve more than twenty-five. Also, interrogatories may only be served on people who are parties to the litigation.

(2) Depositions: Another means of obtaining a sworn statement from a party is to conduct an oral deposition of that party. For details regarding oral depositions, please refer to Fed.R.Civ.P. 27, 28, and 30.

While oral depositions can be helpful, you should know that they are expensive. The person who is seeking to conduct a deposition will be responsible for the costs of the deposition, including having it recorded, even if he or she has been granted permission to proceed *in forma pauperis*. Since these costs can be considerable, you should first consider whether there are more cost-effective means of gathering the information you seek.

(3) Document Production: A party to a lawsuit may obtain access to documents and objects that are in another party's possession or control, in order to be able to inspect or copy them. The party wishing to make the inspection or copies must serve a request to do so on the party who has possession or control of the items, in accordance with Fed.R.Civ.P. 34. As with other discovery, the person who wishes to make copies of documents he or she inspects is responsible for the costs of doing so.

B. GATHERING INFORMATION FROM NON-PARTIES

Sometimes it will be necessary for a party to a lawsuit to gather information from people who are not parties to the lawsuit. There are various methods of seeking such information, some of the most common of which are discussed briefly below. As with obtaining discovery from parties to the lawsuit, **the person seeking the information from the non-party will be responsible for all associated costs, even if he or she is proceeding in forma pauperis.**

(1) Ask First: The best way to gather information or get a statement from someone who is not a party to the lawsuit is to ask him or her! Often, by simply asking the person you can avoid the effort and expense of obtaining a subpoena from the Court.

(2) Subpoenas: Subpoenas are notices, issued by a court, commanding someone to appear at a specified time and place and do some act such as give testimony or produce documents. A party must apply to the Court for a subpoena to be issued. **Subpoenas are not used for parties**; you should use the methods of discovery outlined in Fed.R.Civ.P. 26-37 to gather information from parties. Fed.R.Civ.P. 45 discusses subpoenas.

"Discovery subpoenas" are used during the discovery phase of the lawsuit, and "trial subpoenas" are used to obtain documents and witnesses for trial. You should not attempt

to obtain a trial subpoena until after a judicial officer has informed you of a firm trial date for your lawsuit.

(3) Service and Expense of Subpoenas: A subpoena must be served personally on the person(s) asked to appear in person or to produce particular documents. A subpoena may be served by any person who is at least 18 years of age, so long as the person is not a party to the action or proceeding.

Additionally, various fees (such as witness and mileage fees) must be paid to the person named in the subpoena when the subpoena is served.

(4) Opposition to Subpoenas: A motion to “quash” a subpoena is a motion made by the subpoenaed party to vacate or void the subpoena. A subpoena duces tecum (requesting production of documents) is subject to objections as well as a motion to quash. For the restrictions on subpoenas and the reasons they may be quashed or modified, refer to Fed.R.Civ.P. 45(c).

CHAPTER VIII – LEGAL RESEARCH: AN OVERVIEW

It is not the purpose of this chapter to teach the pro se litigant all of the intricacies of legal research and writing, nor is it our goal to sort out the complexities of applying the law to the facts of a particular case. In fact, the law prohibits personnel employed by the Court, including its attorneys, from providing information regarding the application of the law to the facts of any case. Instead, we are providing information that is basic to a law library as a guideline for conducting your own research.

While you should not be making legal arguments or using legal citations in your complaint, you may need to file documents that make legal arguments at some point during your case. One example of a time when a plaintiff will need to make legal arguments and

use legal citations is when the defendant(s) have filed a motion to dismiss a complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failing to state a cause of action, and the plaintiff wishes to oppose that motion so the case will go forward. As part of the plaintiff's opposition, he or she would submit a memorandum of law which sets forth the legal reasons the plaintiff believes his or her complaint should not be dismissed.

Just as there are certain standards of procedure for filing documents with the Clerk's Office, there are certain standards for citing authority when applying the law to the facts of a case. The most common source people turn to in determining how to write correct citations is *A Uniform System of Citation*, (Seventeenth Edition), published and distributed by The Harvard Law Review Association. It is more commonly referred to as "The Bluebook." All of the information required for proper citation format can be found in this one text. This book is available in most law libraries.

"Authority" is the information used by a party to persuade a Court to find in favor of that party's side. Legal authority is divided into two classes – primary and secondary.

A. PRIMARY AUTHORITY

Primary authority is the most accepted form of authority cited and should be used before any other authority. There are two sources of primary authority: "statutory authority" and "case authority."

Statutory authority consists of Constitutions, codes, statutes and ordinances of either the United States, individual states, counties or municipalities.

Case authority is comprised of court decisions, preferably from the same jurisdiction where the case is filed (in the Northern District, that includes the Second Circuit Court of Appeals and District Court cases from the Northern District of New York). When a particular

case is decided by a judge, it becomes "precedent," which means that it becomes an example or authority to be used at a later time for an identical or similar case, or where a similar question of law exists.

Cases are published in what is called the National Reporter System which covers cases decided by the United States Supreme Court, the Courts of Appeals and the District Courts. Digest systems gather case decisions by subject matter on various points of law. There are many different digests, and they can be found in most law libraries. For example, a person who wishes to bring a civil rights action in federal court can consult digests that contain many cases dealing with the subject of civil rights.

In conducting research, you should try to find cases that have already been decided (precedent) which support the position you are taking in your case.

B. SECONDARY AUTHORITY

Secondary authority is found in legal encyclopedias, legal texts, treatises and law review articles. It should not be cited except where no primary authority is located by the party conducting the research. Secondary authority can also be used to obtain a broad overview of the area of law and also as a tool for finding primary authority.

There are various types of secondary authority, including the following:

Legal encyclopedias contain detailed information about various topics.

Treatises are texts written about a certain topic of law by an expert in the field.

Law review articles are published by most accredited law schools and sometimes provide a broad overview of a particular subject matter.

The *Index to Legal Periodicals* provides reviews of books in the law, as well as comments regarding cases listed in the "Table of Cases."

American Law Reports Annotated (A.L.R.) is a collection of cases on more narrow issues of law.

Restatements are publications compiled from statutes and decisions which discuss the law of a particular field.

Shepard's Citations is a large set of law books that provides a means by which any reported case may be checked to see when and how another court has referred to or interpreted the first decision. Looking to see if another court has cited a reported case is commonly referred to as "Shepardizing." **All cases must be checked to make sure another court has not reversed or overruled the case you wish to use to support your position.**

C. BASIC RULES FOR CONDUCTING LEGAL RESEARCH

- (1) Give priority to cases from your own jurisdiction (i.e., Second Circuit, Northern District of New York).
- (2) Search for the most recent ruling on a subject matter.
- (3) Use the pocket part if your book contains one. A pocket part is a set of pages inserted in a pocket at the back of the book that includes updates to the information contained in the book.
- (4) All legal citations are written with the volume number first, an abbreviation of the Reporter's name, and the page number. For example, "924 F.2d 345" refers to volume 924 of the Federal Reporter, second series, page 345.
- (5) Shepardizing your citations helps you avoid relying on overruled cases.

CHAPTER IX – MOTIONS

A motion is an application by a party (the "movant") made to the Court, requesting a ruling or order in favor of the movant. Motions may be used to seek various types of relief while an action is pending, such as a motion to amend or a motion to compel discovery. However, motions should only be filed when necessary; multiple or frivolous motions can result in sanctions from the Court. See Chapter III Section D on page 6.

Local Rule 7.1 sets forth the procedure for filing a motion in the Northern District; **motions must be filed in conformity with Local Rule 7.1 or else they will be denied.**

Please read and become familiar with all of Local Rule 7.1 before you begin writing a motion.

Please also note that, as with every document you submit to the Court for filing, each

of these documents **must be signed and served on opposing counsel.**

A. DOCUMENTS REQUIRED TO FILE A MOTION

(1) Notice Of Motion: The notice of motion is a concise document identifying (a) the type of motion; (b) the return date (which is the date on which the motion is to be heard by the Court); (c) the time the motion is to be heard; and (d) the street address of the courthouse at which the motion is to be heard. When you make a motion, you choose the return date yourself. In choosing a return date, remember that you must file your papers with the Court and serve them on all parties **at least thirty-one (31) days before the return date that you select.** See L.R. 7.1(b).

(2) Affidavit or Affirmation: An affidavit is a sworn declaration of the facts and procedural background pertinent to the motion, set forth in concise, paragraph form, sworn to be true before a notary public. Affidavits submitted with a motion should contain **only** the procedural history of the case and the factual basis of the claim. While an affidavit is required for most motions, an affidavit is not required, unless the Court otherwise directs, for motions filed pursuant to Fed.R.Civ.P. 12(b)(6), 12(c) or 12(f). See L.R. 7.1(a)(2).

If you do not have access to a notary public, you may submit an affirmation. An affirmation is essentially the same as an affidavit except that, instead of being notarized, the party who signs the affirmation includes a short statement affirming that the statements made in the affirmation are true.

(3) Memorandum of Law: A memorandum of law is a document prepared by a party arguing his or her position on a legal matter in a case. It should contain a brief summary of the significant facts of the case; pertinent laws, including case law; and an argument as to how the law applies to the facts of the case. A memorandum should also refer to specific sections of any affidavits or exhibits that have been filed along with the motion. A

memorandum of law may not exceed twenty-five (25) pages in length.

As with affidavits, there are certain motions for which a memorandum of law is not required, unless the Court directs otherwise. The motions for which no memorandum of law is required are those made pursuant to Fed.R.Civ.P. 12(e), 15, 17, 25 or 37. See L.R. 7.1(a)(1).

(4) Other Documents that May be Required: Often some other document or documents may be required for a particular type of motion. Two of the most common types of motions that require other documents or information are motions to amend and motions to compel.

A motion to amend is filed when a party wishes to amend his or her pleading. For example, a person may want to amend his or her complaint to add a new party, identify a party previously named only as “John Doe,” or add a new cause of action. A motion to amend must be accompanied by the proposed amended pleading, which must be a complete pleading.

A motion to compel is typically used when a party has refused to comply with a discovery request, or when the movant believes the response that was provided to a discovery request is incomplete or insufficient. Before a party may file a motion to compel, the parties must make a good faith effort to resolve the dispute themselves. If they cannot resolve the dispute and a party wishes to file a motion to compel, he or she must provide the Court with both the discovery request itself and the response that is being challenged.

B. TIME CONSIDERATIONS

(1) Moving Papers: Local Rule 7.1 addresses the time frame in which motion papers must be filed. As noted above, the moving party must file the required papers with the Clerk's Office and serve them on the other parties at least thirty-one (31) days before the

return date. (If the return date on the notice of motion is incorrect, the Clerk's Office will set an appropriate date and notify the parties of the new date). Of course, parties must be sure to file all motions within the time limits previously established by the Court.

(2) Response Papers: Parties responding to the motion must file their papers with the Clerk's Office, and serve them on the other party, at least seventeen (17) days before the return date. (For response to cross-motions, see (4) below).

(3) Reply Papers: A movant who wishes to file papers in response to the papers filed in opposition to his or her motion must obtain permission from the Court to file "reply" papers. Such permission will only be granted upon a showing of necessity. If Court permission is granted, reply papers must be filed with the Clerk and served on the opposing parties not less than eleven (11) days before the return date of the motion.

(4) Cross-motions: A cross-motion is a motion made by the responding party against the original movant. A cross-motion requests not only that the original motion be denied, but also that the Court rule in favor of the party filing the cross-motion (the "cross-movant") in some way. A cross-motion must be filed with the Clerk and served on all parties at least seventeen (17) days before the return date of the original motion. Any papers responding to the cross-motion must be filed with the Clerk and served on all parties at least eleven (11) days prior to the original motion date.

CHAPTER X – ENDING A CASE BEFORE TRIAL

Today, most cases never actually go to trial. There are various ways that a case can end before trial, some of the most common of which are discussed below.

A. *SUA SPONTE* DISMISSAL BY THE COURT

If a plaintiff has filed an application to proceed *in forma pauperis*, Title 28, section 1915 of the United States Code governs his or her case. 28 U.S.C. § 1915(d) states that a

judge shall dismiss a case if at any time the Court determines that: 1) the plaintiff's allegations of poverty are untrue, 2) the action is frivolous or malicious, 3) the plaintiff has failed to state a claim upon which relief can be granted, or 4) the plaintiff is seeking monetary relief against a defendant who is immune from such relief.

B. 12(b)(6) MOTION TO DISMISS AND 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

A Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is very similar to a Fed.R.Civ.P. 12(c) motion for judgment on the pleadings. Both motions argue that, even if all the facts the plaintiff has alleged are true, the plaintiff has not stated a valid claim under the law. The essential difference is the time at which each is made: a 12(b)(6) motion to dismiss is made by the defendant after the complaint has been served but before the defendant has submitted an answer; a 12(c) motion is made after the defendant has already filed an answer.

C. MOTION FOR SUMMARY JUDGMENT

Either the plaintiff or the defendant may move for summary judgment pursuant to Fed.R.Civ.P. 56. In a motion for summary judgment, the moving party argues that there is no question of material fact, or in other words, that the parties agree on the important points of what happened. Since a trial is only needed if there are material facts in dispute, if the parties agree on the facts the Court may apply the law to the facts of the case and render judgment without a trial. The plaintiff may wish to make a motion for summary judgment him or herself, or may be called upon to respond to a motion for summary judgment made by the defendant(s).

Local Rule 7.1 requires that a special statement of material facts be filed along with a motion for summary judgment. The Local Rule 7.1 statement of material facts is a

separate document, containing a short and concise statement, in numbered paragraphs, of the significant facts as to which the moving party contends there is no dispute. In preparing a statement of material facts, the movant should cite to exhibits or other documents for support whenever possible.

The party opposing a motion for summary judgment must also include a Local Rule 7.1 statement, responding to the movant's 7.1 statement. The opposing statement should be a short and concise statement of the facts over which a dispute exists. **If the opposing party fails to contest any of the facts contained in the movant's statement of material facts, those facts are deemed admitted.** See Local Rule 7.1(f).

If the opposing party moves for summary judgment and you do not respond in opposition, summary judgment, if appropriate, will be entered against you. If partial summary judgment is granted against you, the portions of your case as to which summary judgment was granted will be dismissed; there will be no trial as to these portions of your complaint. If summary judgment is granted as to your entire complaint, your case will be dismissed and there will not be any trial concerning any of the claims asserted in your complaint.

D. ALTERNATIVE DISPUTE RESOLUTION

If the plaintiff is not a prisoner, the Court may direct the parties to participate in Alternative Dispute Resolution, or ADR. The types of ADR that are used in the Northern District of New York are Arbitration, Mediation, and Early Neutral Evaluation. While these forms of ADR do not render binding judgments on the parties, they often help to clarify the issues and may assist the parties in reaching a settlement before trial. Please refer to Local Rules 83.7 through 86.1 for more information on ADR in this Court.

E. SETTLEMENT

Parties will sometimes reach an agreement on their own as to how to end their case. Typically a defendant will agree to give something to the plaintiff in exchange for the plaintiff ending the suit against the defendant. A settlement can happen any time after initiation of a lawsuit. The process of negotiating a settlement does not involve the Court.

F. FAILURE TO PROSECUTE AND DEFAULT JUDGMENT

A case will only continue to go forward if the plaintiff is actively pursuing his or her lawsuit. Fed.R.Civ.P. 41(b) permits courts to dismiss actions when the plaintiff fails to “prosecute,” or pursue the case. Additionally, Local Rule 41.2(a) provides that the failure of a plaintiff to take any action in his case for four months shall be presumptive evidence of lack of prosecution. Therefore, if a plaintiff fails to take any action in his or her case for a period of four months or more, the case is subject to dismissal by the Court.

A plaintiff can fail to prosecute his or her case in different ways. For example, if a plaintiff fails to provide the Court with an updated address after he or she has moved, or if a plaintiff fails to serve the summons and complaint on the defendant, the case may be dismissed for failure to prosecute. A case may also be dismissed if the plaintiff fails to comply with a Court order.

On the other hand, a defendant may fail to defend him or herself in a case, which can occasionally lead to a default judgment against the defendant, in favor of the plaintiff. Fed.R.Civ.P. 55 and the corresponding Local Rules govern default judgments. You should note, however, that it is well-settled in the Second Circuit that default judgments are not favored, and there is a strong preference for resolving disputes on their merits. *See Brien v. Kullman Indus., Inc.*, 71 F.3d 1073, 1077 (2d Cir. 1995).

CHAPTER XI – TRIAL

The Federal and Local Rules of the Northern District of New York cover all phases of trial preparation from the pretrial conference to the conclusion of a case. The following information is not meant to be all inclusive and you should always consult the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Northern District of New York to ascertain what the Court requires of all parties when preparing for trial and trying a lawsuit. In addition, you should become familiar with the Federal Rules of Evidence, which govern the admission of evidence at trial.

A. FINAL PRETRIAL CONFERENCE AND ORDER

Prior to the actual trial, a pretrial conference is usually held between a judicial officer and a party (or his/her counsel) to determine (1) what exhibits and witnesses each side might use during the trial; (2) the approximate length of time that will be necessary for the trial and (3) the "ground rules" the Court will utilize before, during and after the trial. After this conference, an order is usually prepared which sets out the above. See Attachment 4 to Appendix A of the Local Rules.

B. THE TRIAL – THE ROLE OF THE JUDGE AND JURY

A trial is defined as "a judicial examination of issues between parties to an action." If your case proceeds to trial, the parties will each get the opportunity to present their side of the case, and the judge and jury (if the trial is a jury trial) are responsible for entering a verdict and judgment based on the evidence and arguments presented. It is the judge's duty to see that only proper evidence and arguments are presented. In a jury trial, he or she also instructs the jury, which will be called upon at the conclusion of the jury trial to make decisions regarding factual matters in dispute. A judgment will then be entered based on the

verdict reached by the jury. L.R. 58.1.

If the parties have not requested a trial by jury pursuant to L.R. 38.1, the judge becomes the trier of both law and fact. At the end of the trial, the judge enters "Findings of Fact" and "Conclusions of Law," sometimes in writing, based on the evidence and arguments presented. A judgment is then entered based on those findings of fact and conclusions of law.

C. SELECTION OF THE JURY

A jury trial begins with the judge choosing prospective jurors to be called for voir dire (examination). See L.R. 47.1 and General Order No. 24. The Court will determine the number of jurors, which is currently at least six (6) and no more than twelve (12). L.R. 48.1. *Peremptory challenges:* Each party will be given a number of peremptory challenges which enable the party to reject (in most cases) prospective jurors without cause. This decision is based on subjective considerations of the party when he or she feels a prospective juror would be detrimental to his or her case.

Challenge for Cause: The plaintiff or defendant may also challenge a prospective juror "for cause" when the prospective juror lacks a qualification required by law, is not impartial, is related to either of the parties or will not accept the law as given to him/her by the Court.

D. OPENING STATEMENTS

After the jury is sworn in or "empaneled," each side may present an opening statement. The plaintiff has the burden of proving that he or she was wronged and suffered damages from that wrong and that the defendant caused those damages. The plaintiff is allowed to present the opening statement first. This may be followed by a statement by the defendant. The Court will determine the time to be allotted for opening and closing arguments. See L.R. 39.1.

E. TESTIMONY OF WITNESSES

After opening statements are given, testimony of witnesses and documents are presented to the jury or the Court. The plaintiff presents his/her case first. After the initial examination of a witness (also known as "direct examination"), cross-examination is conducted by the other side. After a party has cross-examined a witness, the opposing side has the opportunity to "redirect" examination in order to re-question the witness on the points covered by the cross-examination.

If a witness testifies as to one fact, and a statement or document in the case file contradicts that testimony, the document can then be used to question the witness on the accuracy of the witness' statements. If the evidence shows that the testimony of the witness is false, the witness is considered "impeached" by the cross-examination.

F. MOTIONS DURING THE COURSE OF THE TRIAL

Before the closing arguments and up until the time the case is sent to the jury for deliberation, the following motions may be made:

(1) Motion in Limine: This motion is typically made prior to the jury selection. It requests that the judge not allow certain facts to be admitted into evidence, such as insurance policies, criminal records or other matters which are either not relevant to the particular case or which might unfairly influence the jury. Either party may file a motion in limine.

(2) Motion for Judgment as a Matter of Law: This motion is usually made by the defendant at the close of evidence presented by the plaintiff. It is based on the premise that the plaintiff has failed to prove his or her case. If this motion is granted, the trial is concluded in the movant's favor. If the Court denies the motion, the trial continues with presentation of the defendant's side.

(3) Motion for Mistrial: Either party can move for a mistrial if, for example, during the course of the trial certain matters which are not admissible (such as those determined to be inadmissible in a prior motion in limine) are presented by any witness, either purposely or unintentionally, in the presence of the jury. If the judge grants the motion for mistrial, the trial is immediately ended and the jury is dismissed.

(4) Objections: During the examination of a witness, one side may "object" to the questioning or testimony of a witness, or presentation of evidence, if the litigant believes that the testimony or evidence about to be given should be excluded. If the objection is *sustained* by the judge, that particular testimony or evidence is excluded. If the objection is *overruled* by the judge, the testimony or evidence may be given despite the objection.

G. REBUTTAL TESTIMONY

After each side has presented its evidence, the plaintiff may be allowed by the judge to present some rebuttal testimony.

H. CLOSING ARGUMENTS

Closing arguments to the jury set out the facts that each side has presented and the reasons why each party believes the jury should find in favor of him or her. Time limits are sometimes set by the Court for closing arguments, and each side must adhere to the specified time. See L.R. 39.1.

I. CHARGE TO THE JURY

After each side presents testimony and evidence, the judge delivers the "charge" to the jury, usually in the form of written instructions. Each side may present proposed written instructions to the judge for consideration. After the judge has considered all proposed instructions, the jury is given appropriate instructions which set forth the jury's responsibility

to decide the facts in light of the applicable rules of law. The jury then returns a verdict in favor of either the plaintiff or the defendant and assesses damages to be awarded, if any.

J. MISTRIAL

If a jury is unable to reach a verdict and the judge declares a mistrial, the case must be tried again before a new jury. A jury which cannot reach a verdict is usually referred to as a "hung jury."

K. JUDGMENT AND COSTS

Following the entry of the jury's verdict, judgment in favor of the prevailing party is entered forthwith by the Clerk.

If costs are awarded to the prevailing party, it is necessary to prepare a "bill of costs" for the approval of the Court. A bill of costs sets forth those costs that were incurred in the suit. See L.R. 54.1. A prevailing party may serve a bill of costs within thirty (30) days after entry of a judgment. If attorney's fees are awarded, an application for attorney's fees must be made by motion filed no later than fourteen (14) days after entry of judgment. See Fed.R.Civ.P. 54(d)(2).

L. SATISFACTION OF JUDGMENT

Satisfaction of a money judgment will be entered by the Clerk's Office upon the specific conditions set forth in L.R. 58.2.

M. POST-TRIAL MOTIONS AND APPEALS

If you are unhappy with the ultimate disposition of your action, you may choose to file post-trial motions relating to your case. Additionally, you may choose to appeal the outcome of your lawsuit to the Second Circuit within thirty days of the disposition.